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No. 88-749

IN THE

Supreme Court of the United States

October Term, 1988

WILLIAM KUNTZ III and
WESTMINISTER COMPANY, INC.,
aka ONE WESTMINISTER COMPANY, INC.,
Petitioners.

vs.

THE CITY OF DAYTON, OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

QUESTION PRESENTED

Were the Ohio Courts Correct In Their Determination That The Eradication Of Urban Blight And Deterioration By A Municipal Corporation Through The Exercise Of The Power Of Eminent Domain Is Rationally Related To The Furtherance Of The Public Welfare And Not In Contravention Of The United States Constitution Or The Constitution Of The State Of Ohio?

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INTRODUCTORY STATEMENT

This case originated in the common pleas court of Montgomery County, Ohio, when the City of Dayton, Ohio (Respondent) filed a Complaint for appropriation of property pursuant to Chapter 163 of the Ohio Revised

Code. William Kuntz III and Westminister Co. Inc., a corporation solely owned by Kuntz, (Petitioners) were two of the owners of the appropriated property located in the downtown area of the City of Dayton. The trial court upheld the right of Respondent to appropriate the subject property and a jury awarded compensation to Petitioners in the amount of $235,000 which has been paid into the court.

The state court of appeals unanimously affirmed the verdict of the trial court and The Supreme Court of Ohio overruled Petitioners' motion for an order directing the court of appeals to certify its record and found no substantial constitutional question to exist. The Ohio Supreme Court subsequently denied Petitioners' motion for rehearing.[1]

[1] The references are to the opinions and orders of the Ohio Courts which are appended to the Petition for Writ of Certiorari.

THE FACTS

Briefly stated, the facts found by the Ohio common pleas court and affirmed as having substantial support in the evidence by the court of appeals of the state are as follows:

On March 27, 1985, the Dayton City Commission passed Ordinance 27172, adopting an urban renewal plan approved by the City Plan Board which was known as Arcade Square II.

The trial court found that in approving the Arcade Square II urban renewal plan, the City Commission had before it for its consideration facts and conditions in the project area and findings as to their effect upon the health, safety and welfare of the people who work in and own or use property in the project area. Specific documents before the Commission included: The Urban Design Plan For Downtown Dayton, Ohio; Development and Design Considerations For Phase Two Development of Arcade Square; Market Analysis For Office Development, Arcade Block, City of Dayton, Ohio; blight study which included the Project Area Report containing the detailed results of the blight study conducted on the buildings in the Arcade Square II Urban Development Area; studies relative to relocation plans; environmental impact statements; a comprehensive future land use plan; and the Arcade Square II Urban Renewal Plan.[2]

The Arcade Square II renewal plan objectives included the clearance of a significant portion of the renewal area, excluding from clearance only those structures on or eligible for inclusion in the National

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[2] Petitioners' Appendix C, p. 49.

Register of Historic Places, and the construction of an office building and a parking garage. The acquisition of Petitioners' property was necessary for the construction of the parking garage.

Petitioners each owned part of an undivided interest in the building located on the appropriated property. A tenant commercial establishment known as Alladin Cleaners was the only occupant of the property. According to the architect's inspection report quoted in the opinion of the court of appeals, the subject building was deficient in the following respects:

> Plumbing: Abandoned and/or inoperable fixtures exist at all levels of both occupied and nonoccupied areas. The number and locations of existing fixtures is inadequate to comply with current code requirements.
>
> Heating: Inoperable (not currently used).
>
> Electrical: Electric systems are inoperable and inadequate for nonoccupied areas.
>
> Lighting & Ventilation: Inoperable windows and mechanical ventilation systems (some areas lack mechanical ventilation) lighting is inoperable and inadequate.
>
> Fire Safety: Ingress and egress from mezzanine and second floor is inadequate. There are no enclosed internal stairs leading to the exterior. Two such stairs would be required by current codes.
>
> Windows and Doors: Exit access corridors are nonexistent and doors for such are nonexistent. Exterior walls with limited fire separation are questionable as to the fire ratings and doors. Windows in these walls are not currently rated for even minimum opening requirements.[3]

[3] Petitioners Appendix B, p. 27.

A hearing on the Respondent's right to appropriate the Petitioners' property was held before Visiting Judge Robert D. Nichols on February 2, 3, and 4, 1987. In a Decision and Entry filed February 23, the trial court held that Petitioners had failed to carry their burden of proof under Section 163.09 of the Ohio Revised Code to show that Respondent had abused its discretion in determining that it was necessary to appropriate their property. According to the court, the area in question was in a deteriorated and blighted condition and there was a reasonable relationship between the remedy of urban renewal and the problem of blight and deterioration.[4]

[4] Petitioner's Appendix C.

REASONS FOR DENYING THE WRIT

This case presents no question of unsettled law. As a matter of fact, every major city in Ohio has at one time or another over the past thirty-five years used its home rule urban renewal powers in an effort to revitalize aging and deteriorating downtown commercial properties and, in the process, has exercised its powers of eminent domain.

The Municipal Exercise Of The Power Of Eminent Domain To Eliminate Urban Blight And Deterioration Does Not Violate The Public Use Provisions Of The Fifth Amendment Or The Due Process Clause Of The Fourteenth Amendment To The United States Constitution Nor The Public Welfare Provision Of Section 19, Article I Of The Ohio Constitution.

The power of eminent domain is a basic attribute of sovereignty superior to all private rights. *Georgia v. City of Chattanooga*, 264 U.S. 472,480 (1924). This power, however, is circumscribed by the Fifth and Fourteenth Amendments to the United States Constitution. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

The public use requirements of the Fifth and Fourteenth Amendments to the United States Constitution are defined in *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, *supra*.

> ".... Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia .... or the

> States legislating concerning local affairs .... This principle admits no exception merely because the power of eminent domain is involved ...." *Berman v. Parker,* Id. at 32.

Similarly in *Hawaii v. Midkiff, supra.*

> "To be sure, the Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation is paid.....' But where the exercise of eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause....." Id. 241.

The seminal case defining a proper public purpose under the Ohio Constitution is *State ex rel. Gordon v. Rhodes,* 156 Ohio St. 81 (1951) wherein the second paragraph of the syllabus provides:

> "The determination of what constitutes a public municipal purpose is primarily a function of the legislative body of the municipality, subject to review by the courts, and such determination by the legislative body will not be overruled by the courts except in instances where that determination is manifestly arbitrary or unreasonable."

Following *State ex rel. Gordon v. Rhodes, supra,* the Ohio Court decided another landmark urban renewal case, *State ex rel. Bruestle v. Rich,* 159 Ohio St. 13 (1953). In *Bruestle* the Court determined that property taken for "the public welfare" is property taken for a "public use." Further it was decided that if the primary purpose for the exercise of eminent domain is to acquire property for the public welfare that power may be exercised under Section 19, Article I of the Ohio Constitution even where there may be an incidental

nonpublic use of the property or benefit from its taking. Finally, in the fifth paragraph of the syllabus, the *Bruestle* court determined:

> "The elimination of slum *and other conditions of blight* and provisions against their recurrence are ordinarily conducive to 'the public welfare' as these words are used in Section 19 of Article I of the Ohio Constitution." (Emphasis added).

Made implicitly clear in *State ex rel. Gordon v. Rhodes, supra,* and *State ex rel. Bruestle v. Rich, supra,* is the fact that in Ohio both the power of eminent domain and the power of urban renewal are home rule powers directly conferred on Ohio municipalities by virtue of Section 3 of Article XVIII of the Ohio Constitution.

Petitioners state the issue presented in their petition for certiorari as follows:

> "This court must determine whether the Dayton ordinances authorizing the exercise of the City's eminent domain powers, contained the legislative findings required by the laws in the State of Ohio and the ordinances of the City of Dayton, Ohio."[5]

After reviewing the evidence, both the trial court and the court of appeals concluded that in enacting the Arcade II urban renewal plan and in authorizing the condemnation of Petitioner's property, the municipal legislative branch had before it evidence from which it could have concluded that the area in question was a slum, blighted or deteriorating area and that the elimination of such conditions was a proper public purpose for the exercise of the municipal power of eminent domain.

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[5] Petitioners Brief, p. 13.

The trial court and the court of appeals found that Petitioners failed to prove that the Respondent's action in designating Petitioners' property as part of an urban renewal area was arbitrary, capricious or unreasonable. In the words of the trial court:

> "Defendants [Petitioners] simply failed to contradict or explain away by other evidence of equal or greater weight the prima facie quality of the relevant ordinances. This court is not entitled to substitute its judgment for that of the City Commission and there is no clear showing that council excluded [exceeded] its constitutional or statutory authority or that it abused its discretion. Nor was the determination of slum, blight or deterioration manifestly arbitrary or unreasonable. The area in question was in a deteriorated and blighted condition. And, there was a reasonable relationship between the act of urban renewal and remedy to the existing problem."[6]

The Court of Appeals came to the same conclusion:

> ". . . . After reviewing the record we conclude that the City's decision to appropriate Kuntz's property was not arbitrary or unreasonable and was supported by the necessary findings of fact. . . . . Consequently the judgment of the trial court will be affirmed."[7]

The Ohio court of appeals directly addressed the Petitioners' contention that the legislative findings of the Dayton City Commission were not sufficient as a matter of law. It concluded that upon review of Dayton Ordinance 27172 (adopting the urban renewal plan for the Arcade II Urban Renewal Project) and Ordinance 27306 (amendment to Ordinance 27172 making specific findings of conditions in the Arcade II Urban Renewal

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[6] Petitioners' Appendix C, pp. 50-51.

[7] Petitioners Appendix B, p. 25.

Project), it was clear that the Dayton City Commission had considered, reviewed and accepted the report of the City Plan Board. In so doing, the court found that the Commission had implicitly adopted the factual findings contained in the report of the City Plan Board and embraced the conclusion that the buildings in the project area, including Petitioners' building, were in a deteriorating state.[8] The Ohio court further found from its examination of the record that Ordinance 27407[9] (the ordinance that directed the city attorney to proceed with the appropriation of Petitioners' property) contained a statement that the immediate acquisition of such property was necessary to prevent the recurrence of the condition of slum, blight and deterioration which exist or existed in the project area. Therefore, the court of appeals determined that Ordinance 27407 when read in conjunction with Ordinance 27172 and Ordinance 27306 provided the necessary finding of blight and deterioration needed to satisfy the requirements of law.

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[8] Petitioners' Appendix B, pp. 38-39.

[9] Respondent's Appendix A.

CONCLUSION

The trial court and the court of appeals followed the precedents of Ohio law in finding that a municipal corporation may use its home rule power of eminent domain in furtherance of an urban renewal program to eliminate blight from its deterioration downtown business districts. This is a question long settled in Ohio, witness the numerous urban renewal programs that have already aided the rejuvenation of the downtown commercial core of many communities. The Respondent has acquired and paid a fair jury awarded compensation for the subject property, has demolished a substandard building on the property and is in the midst of preparing for further redevelopment.

For all the reasons stated herein, the Petition For Certiorari should be denied since there has been no violation of Petitioners' rights under either the Fifth or Fourteenth Amendments to The United States Constitution.

Respectfully submitted,

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APPENDIX

RESPONDENT'S EXHIBIT A

By Mr. Henry No. 27407

AN ORDINANCE

To Appropriate Property Being Parcel 6 Located at 44 W. Third Street in Connection with the Arcade Square II Urban Renewal Project, and Declaring an Emergency.

WHEREAS, The City Commission by Resolution No. 4101, adopted May 14, 1986 heretofore declared its Intention to appropriate the property hereinafter described for clearance and redevelopment purposes as part of the plan for the Arcade Square II Urban Renewal Project; and

WHEREAS, The City and the owners have been unable to agree on the purchase price of the property; and

WHEREAS, It is necessary for the immediate preservation of the public peace, property, health and safety that this ordinance take effect at the earliest possible time, for the reason that this property be immediately appropriated as the earliest possible acquisition of the property herein is necessary to expedite the redevelopment of said Project Area and to thereby prevent the recurrence of the conditions of slum, blight and deterioration which exist or existed in the Project Area, now, therefore,

BE IT ORDAINED BY THE COMMISSION OF THE CITY OF DAYTON:

Section 1. That there is by appropriated for the purpose stated in the preamble hereof the fee simple interest in the following described property, to-wit:

Parcel 6

Situated in the City of Dayton, County of Montgomery, State of Ohio and described as follows: being part of lot numbered ONE HUNDRED SIXTY (160) of the revised and consecutive numbers of lots on the plat of the said City of Dayton, and being more particularly described as follows: beginning at a point in the north line of said lot numbered one hundred sixty (160) a distance of forty nine feet and one inch (49′ 1″) east of the northwest corner of said lot; thence southwardly along a line parallel to the west line of said lot being along the centerline of the wall and columns of a proposed building, a distance of eighty eight feet (88′) to a corner; thence eastwardly along a line parallel to the north line of said lot (being along the north side of a seven (7′) feet, six (6″) inch private court to a point; thence northwardly along a line parallel to the west line of said lot, being along the centerline of the wall and columns of said proposed building, a distance of eighty eight feet (88′) to a point in the north line of said lot; thence westwardly along the north line of said lot, a distance of eighteen feet (18′) to the place of beginning.

Said property being located at 44 W. Third Street.